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No. 83-1767.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1984

SHARON WHITE,
PETITIONER,

v.

THOMAS VATHALLY AND
CITY OF HAVERHILL,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

KEVIN G. POWERS,
JOHNSON AND POWERS, P.C.,
12 Kimball Road,
Lynn, Massachusetts 01902.
(617) 592-0398

ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the First Circuit properly held that a plaintiff in an employment discrimination action who sets forth a prima facie case may not succeed merely by showing that the defendants articulated reason was not the true reason for its employment decision but that the plaintiff must further prove discriminatory intent on the part of the defendant.
2. Was the District Court of the United States for the District of Massachusetts' finding that the defendant had not discriminated against the plaintiff on account of her sex in error.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner Sharon White respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on May 1, 1984.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a-21a) is reported at 732 f.2d 1037. The decision and order of the United States district court for the District of Massachusetts (App. B, infra, 22a-45a) is reported at 570 F Supp. 1431.

JURISDICTION

The judgment of the court of appeals for the First Circuit was entered on May 1, 1984. A timely petition for a rehearing en banc was denied on June 8, 1984, and this petition for certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENT INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> "nor shall any State deprive any person or life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

Section 2000 e-2(1) of Title 42 of the U.S. Code provides in part:

"It shall be an unlawful employment practice for an employer --

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of race, color, religion, sex or national origin."

STATEMENT OF CASE

The peititoner, Sharon White, (hereinafter the petitioner) is a female who asserts that she was discriminated against on account of her sex by Thomas Vathally and the City of Haverhill.

The petitioner held the position of assistant health code inspector for the City of Haverhill under a Comprehensive Employment Training Act (C.E.T.A) appointment from March 26, 1979 to Setpember 19, 1980. On August 31, 1980. while the petitioner

was employed as an assistant health code inspector, health inspector Belfiori retired creating a vacancy in the health department. On September 2, 1980, at the petitioner's request, Mayor Vathally met with her. The mayor was aware of Belfiori's retirement at the time of the meeting and admitted that he believed that the petitioner was qualified for the position of health code inspector, yet at the meeting, Mayor Vathally told the petitioner that there were no positions in the city available for her. (Tr 1-21)

Equal Employment Opportunity Officer Guillmo Barrio advised the city that the proper course of conduct was for the city to promote the petitioner from her

provisional, part-time position to the permanent position vacated by Belfiori (Tr 1-93, 103, 113). The city refused to promote the petitioner and instead sought, through newspaper advertisements, other candidates for the position.

The stated requirements for the inspectors position were; one year of full-time or equivalent part-time technical or professional experience in a building construction trade, the field of environmental sanitation, housing inspection or a combination of these. There were no stated educational requirements for the position. (T.E.8). Neither the position of assistant health code inspector, which the petitioner held, nor the position the petitioner sought required any scientific analysis, each consisted merely of visual inspections of dwellings for health code violations (T.R. 1-16,17).

The petitioner applied for the advertised position and submitted with her application six letters. These letters were commendations and recommendations written by individuals working either for or with the city health department. The mayor did not contact or speak to any of the individuals whose letters were submitted by the petitioner. The mayor did not consult with Arthur Papachristen, the head of the health department and the supervisor of the health code inspectors who had requested that the mayor appoint the petitioner to fill the vacated position. (T.R. 1-16, 17; T.R. 1-189, 190, 191). Before appointing Dominic Badalato, a white male, Mayor Vathally did seek the advise of Gene Grillo an environmental consultant to the City of Haverhill. The district court found

that Grillo had recommended Badalato to the mayor for a previous job with the city (App. B infra 38a), that at an interview concerning the position of health code inspector Badalato had given Grillo's name to the mayor as a reference (App B, infra 38a). The district court further found that neither Vathally nor Grillo were as familiar with the duties of a health code inspector as those persons who recommended the petitioner for the position (App B, infra 38a) and that in appointing Badalato Mayor Vathally did not follow the procedures set forth in the city's Equal Employment Opportunity Policy (App. B, infra 39a).

The district court found that considerations beyond those articulated by the defendant may have been factors in the decision not to promote or hire

the petitioner (App. B, infra 45a), and further found that the chosen candidates educational qualifications were not the sole reason he was chosen over the petitioner (App. B, infra 44a). In applying the law to the facts, however, the court found that the petitioner was mistaken in her assertion that she could meet her burden of proof by first establishing a prima facie case and then showing that the defendants articulated reason was not the true reason for the decision (App. B, infra 30a).

The court of appeals affirmed the district court decision holding that it was not sufficient for a plaintiff to show that the defendants proffered reason was a pretext or was unworthy of belief, but that a plaintiff had to affirmatively prove discriminatory intent (App. A, infra 19a).

REASONS FOR GRANTING THE PETITION

The questions presented in this case concern the plaintiff's burden of proof in a discrimination case. This issue is of considerable practical importance to the administration of Title VII, 42 USC 2000e, the Age Discrimination Act, 29 USC §621 et seq., and the Equal Protection Clause of the Fourteenth Amendment. The court of appeals has decided the present case in a manner which appears to be in direct conflict with this Court's decision in Texas Department of Community Affairs v. Burdine 450 US 248, 256. The court of appeals decision in the present case is also in direct conflict with four other court of appeals.

I This Court's decision in the case of Texas Department of Community Affairs v. Burdine id 255, 256 held that

after a plaintiff has established a prima facie case and the defendant has articulated a legitimate nondiscriminatory reason for its action, the plaintiff has an opporutnity to prove her case by demonstrating that the defendant's proffered reason is pretextual, ie., not the true reason for the employment decision. The burden of proving pretext merges with the plaintiff's ultimate burden of persuading the court that she has been the victim of intentional discrimination. This ultimate burden of proving intentional discrimination may be met in one of two ways: directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing

that the employer's proffered explanation is unworthy of credence. Burdine id 255, 266.

The petitioner argued to the district court that she could succeed in proving her allegations of sexual discrimination by means of the indirect method set forth in Burdine. The district court dismissed this argument and stated:

"Therefore, a showing that the proferred reason is not the true or entire explanation for an employment decision does not satisfy the plaintiff's burden of persuasion unless the fact finder is persuaded, by a preponderance of evidence that the employer discriminated against the plaintiff on account of her sex." (App. B, infra 32a, 33a)

The court of appeals in affirming the district court decision, held that a

showing of pretext does not relieve the plaintiff of the burden of proving discriminatory intent (App. A, infra 19a). In contrast this Court held that proof of pretext is the indirect method of proving discriminatory intent. Burdine id 256.

Other circuit court of appeals which have considered the plaintiff's burden of proof once a prima facie case has been established and a legitimate business reason articulated have reached decisions squarely in conflict with the decision reached by the first circuit.

The Second, Third, Eighth and Ninth circuit courts and the court of appeals for the District of Columbia have conlcuded that proof by a plaintiff that the reason articulated by the defendant for its employment decision is pretextual, is sufficient

to prove discriminatory intent.[-1]

The court of appeals for the Third Circuit stated: "however, under the McDonnell Douglas test, a showing that a proffered justification is pretextual is itself equivalent ot a finding that the employer intentionally discriminated." Duffy v. Wheeling Pittsburg Steel Corporation ___F[2]____(3rd Cir. 1984), 35 FEP Cases 247, 248 (decided July 10, 1984).

The court of appeals for the District of Columbia held: "if however, appellant shows that reason (articulated by the defendant) to be

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-1 Lanphear v. Prokop, 703 F[2] 1311 (D.C.C.A. 1983). See also Sweeney v. Research Foundation of State of New York, 711 F2 1179, 1186, 1187 (2d Cir. 1983), Vaughn v. Westinghouse Electric Corp. 702 F2 137, 139 (8th Cir. 1983), Thorne v. City of El Seguendo, 726 F2 459, 465 (9th Cir. 1983).

specious, then in conjunction with his prima facie case, the appellant has earned the burden of proving discrimination by a preponderance of evidence."

The conflict which exists between the court of appeals decision in the present case and the decision of this Court as well as the conflict between the court of appeals decision in this case and the cases decided in other circuits, creates a clear and irreconcilable conflict which is not likely to be resolved by future cases. The decision of the First Circuit threatens to have a substantial and reoccuring effect on decisions of district and appellate courts throughout the country. The conflict can only be

effectively resolved by prompt action on the part of this Court.

II The petitioner submits that even if the district court applied the correct standard of proof in the present case in requiring affirmitive proof of discrimination the court was nonetheless in clear error in not entering a finding for the petitioner. The petitioner presented overwhelming and unrebutted evidence of disparate treatment and violations by the defendants of the city's Affirmative Action Policy.

On August 31, 1980 health code inspector Belfiori retired, thus creating a vacancy in the city's health department. The petitioner, who, at the time of Belfiori's retirement

was employed as an assistant health code inspector, met with Mayor Vathally to express her desire to continue working for the city after her C.E.T.A. appointment expired. At that meeting, held on September 2, 1980, the mayor informed the petitioner that there were no positions available for her. Mayor Vathally admitted that by September 2 he knew of Belfiori's retirement and that he knew that the petitioner was qualified to be a health code inspector (Tr.2-114).

The city decided not to promote the petitioner and advertised for candidates for the position disregarding the city's own Affirmative Action Officer who advised the city that a failure to hire the petitioner would be a violation of the city's affirmative action policy (Tr.93, 103).

Once the position became open to all applicants the city engaged in a policy of treating the plaintiff differently from the only qualified male candidate. The petitioner did not receive a post application interview, in contrast, Vathally, upon receiving Badalato's resume instructed his secretary to schedule a job interview between he and Badalato (Tr.2-115).

Attached to the plaintiff's resume and application for the position of health code inspector were letters of recommendation and commendation. It was admitted by Vathally on cross examination that all the individuals who wrote letters on behalf of the plaintiff were more familiar with the duties and

responsibilities of a health code inspector than either Vathally or Grillo, yet Vathally did not seek the advise of individuals who recommended the plaintiff or any individual who had worked for or with the Department of Health (Tr. 22-155,158). Instead, Vathally claims to have contracted and relied on the advise of Grillo, a corporate environmental engineer, who had only general familiarity with the State Health Code and who had never worked for a health department (Tr. 1-173,174).

It was no coincidence that Vathally claims to have relied solely on the advise of Grillo. During the interview Vathally held with Badalato, Vathally was informed by Badalato that Grillo would recommend him for the health inspector's job (Tr. 2-42). In

fact, Grillo had earlier recommended Badalato to Vathally for a water department position (Tr. 1-176).

Vathally claims to have called Grillo and arranged a meeting in Vathally's office so that Grillo could "objectively" review the resumes of the plaintiff and Badalato. It is clear that Grillo was not qualified to decide who would be the best candidate for the position of health code inspector nor was he objective. In light of Vathally's failure to mention the office meeitng in his deposition there is some doubt whether the meeting ever took place (Tr. 2-173). If the meeting did take place, it was such a clear set-up that it should have been considered as evidence that Vathally knew he was acting improperly in selecting Badalato and set up the meeting to

add some much needed credibility to his decision.

The district court found that Vathally violated the city's Equal Employment Opportunity Policy when he appointed Badalato before the Equal Employment Opporutnity officer had an opportunity to review the list of applicants (App. B, infra, 45a).

Barrio testified that Vathally was aware of the EEO Policy and had complied with it from February 6, 1980 to the time of the appointment of Badalato (Tr. 1-98,99).

The City of Haverhill chose not to promote a highly qualified and conscientious worker to a full-time permanent position. Once the city decided to seek applicants for the position of health code inspector it violated its own EEO Policy, treated the only

qualified male applicant differently than the plaintiff and made a decision without consulting with the health department supervisor or any other person who had experience in the health department. The city's explanation that Badalato was chosen because of his superior education is not worthy of credence first because the job description did not require any special education, second because the job had always been competently performed by individuals who did not have BA degrees and third because the plaintiff had performed the job of an assistant health code inspector wiht exceptional ability.

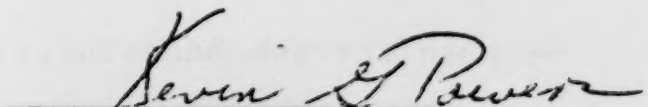
The plaintiff submits that a review of the entire record submitted to

this Court leads to a definite and firm conviction that the district court made a mistake and, therefore, the district court judgment should be reversed. United States v. U.S. Gypsum, 33 US 364 (1948).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



KEVIN G. POWERS
JOHNSON & POWERS, P.C.
12 Kimball Road
Lynn, MA 01902
(617) 592-0398

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 83-1767

SHARON WHITE,
Plaintiff-Appellant,

v.

THOMAS VATHALLY
and
CITY OF HAVERHILL,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MASSACHUSETTTS

[Hon. Robert E. Keeton,
U.S. District Judge]

Before

Campbell, Chief Judge,

Bownes, Circuit Judge,

and Gierbolini,* District Judge.

Kevin G. Powers, with whom Johnson & Powers, P.C. was on brief, for appellant.
Ashod N. Amirian, with whom Paul Kazarosian, and Kazarosian, Kazarosian & Colella were on brief, for appellees.

May 1, 1984

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* Of the District of Puerto Rico, sitting by designation.

BOWNES, Circuit Judge. This is an employment discrimination action under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e et seq., and under 42 U.S.C. §1983. Plaintiff Sharon White claims that defendants, the City of Haverhill and former Mayor Thomas Vathally, discriminated against her on the basis of her sex in failing to appoint her to a permanent position as Health Department code enforcement inspector. Following a two-day bench trial, the district court issued a published opinion, White v. Vathally, 570 F.Supp. 1431 (D. Mass. 1983), and entered judgment for defendants. Plaintiff appeals, alleging errors of law and fact in the district court's judgment.

The factual background is fully set out in the district court's opinion, and only a brief summary is required here. Plaintiff worked for the City of

Haverhill as a temporary Health Department code enforcement inspector from march 26, 1979, through September 19, 1980, when her CETA appointment terminated. She had completed some college credits in psychology and held an associate's degree, but did not have a bachelor's degree. Her work included checking buildings for health code violations and testing the lead content of paint. On August 31, 1980, Vincent Belfiore, another code enforcement inspector, retired from his job, creating a vacancy. At plaintiff's request, Mayor Vathally met with her on Spetmber 2, 1980; he informed her that there were no positions available at that time. From October 2, 1980, through October 5, 1980, defendants advertised the availability of the position left vacant by Belfiore's retirement; the advertisements did not mention a need or preference for a

college degree. Plaintiff applied for the job, submitting an application, resume, cover letter, and letters of recommendation to Vathally. Vathally asked Dr. Grillo, the city's environmental consultant, to review the applications of the two finalists for the job, plaintiff White and Domenic Badolato. Badolato, a white male, had been employed as a code enforcement inspector under the CETA program from mid-June of 1978 through mid-December of 1979; he held a bachelor's degree with a major in biological science, and had completed some postgraduate credits. Grillo, who had recommended Badolato for a previous job with the city, and who was listed by Badolato as a reference, recommended Badolato for the job on the basis of Badolato's superior educational background. Without consulting anyone else, Vathally, the city's sole

appointing authority, hired Badolato.

In order to prove an individual claim of discriminatory treatment, whether under the Constitution or under Title VII, a plaintiff must prove purposeful discrimination, see Washington v. Davis, 426 U.S 229, 239-41 (1976). Where direct evidence of discriminatory intent is lacking, we have recognized that the analytical framework for proving discriminatory treatment set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973), is equally applicable to constitutional and to Title VII claims. T & S Service Associates v. Crenson, 666 F.2d 722, 724 n.2 (1st Cir. 1981). Applying the McDonnell Douglas standard, the district court found that plaintiff established a prima facie case of discriminatory treatment; the parties do not dispute that finding, and it is not in issue on appeal. It is the

court's subsequent findings that defendants met their burden of "articulat[ing] some legitimate, nondiscriminatory reason" for their action, McDonnell Douglas, 411 U.S. at 802, and that plaintiffs failed to show the proferred reason to be a pretext for discrimination, id. at 804, which plaintiff contends are erroneous.

It is important to remember that the ultimate issue in discriminatory treatment cases is whether the plaintiff proves intentional discrimination by a preponderance of the evidence, and that the allocation of evidentiary burdens under McDonnell Douglas is

> merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). The burden of persuasion on the issue of discriminatory intent always remains with the plaintiff, and the "legally mandatory, rebuttable presumption" of unlawful discrimination raised by a prima facie showing compels judgment for the plaintiff only "[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 & 254 (1981). If the defendant carries the burden of articulating a legitimate, nondiscriminatory reason for his actions, the presumption of discrimination "drops from the case," id. at 255 n.10, and plaintiff's burden of rebutting defendant's proffered reason "merges with the ultimate burden of persuading the court that she has been the victim of

intentional discrimination." Id. at 256.

The district court, citing Burdine, correctly stated the defendant's burden of producing evidence of a legitimate, nondiscriminatory reason as follows:

> [T]he employer only need raise a genuine issue of fact as to whether it discriminated against the plaintiff by introducing evidence setting forth the reason for the plaintiff's rejection.
>
> . . . .
>
> The employer does not have the "burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff." Burdine, supra, at 257. The employer need only produce evidence sufficient to allow the factfinder reasonably to conclude that the employment decision was not motivated by discriminatory animus. Id. A weak correlationbetween the articulated criteria and job performance may support an inference that the employer's proffered explanation was a pretext for illegal discrimination, but it does not compel such an inference.

The district court also noted that "the employer's explanation of legitimate reasons must be clear and reasonably

specific," rather than "[a] 'passing reference by just one of many witnesses to some deficiency' in the plaintiff's qualifications or a vague averment of good faith," quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.5 (1st Cir. 1979). It recognized that one purpose of articulating reasons is to give the plaintiff a fair opportunity to respond, see Burdine, 450 U.S. at 255-56, and found that defendants adequately articulated Badolato's superior educational qualifications as a legitimate reason for preferring him over White.

Although plaintiff argues that educational qualifications were not reasonably related to the requirements of the job in question and thus could not constitute a "legitimate" explanation, the district court expressly found to the contrary. On appeal, we cannot say that

it was clear error to find that an employer might reasonably regard Badolato's educational qualifications as indicating "self-discipline and an ability to complete tasks and follow instructions."

Plaintiff raises a more troublesome question concerning the evidentiary basis for the court's finding that defendants met their burden of production. The articulation of reasons must take place "through the introduction of admissible evidence." Burdine, 450 U.S. at 255. "An articulation not admitted into evidence will not suffice. Thus, the defendant cannot met its burden merely through an answer to the complaint or by argument of counsel." Id. at 255, n.9. The district court found as follows:

> In his answers to interrogatories and requests for admissions, and in his deposition, Vathally repeatedly stated that the decision to hire Badolato was based on Badolato's

> superior qualifications for the job--specifically, his educational background. Vathally testified at trial that he based his decision on Grillo's recommendation. Grillo in turn testified that he believed Badolato's bachelor's degree and extensive training in the sciences made him better qualified for the job.

Vathally's answers to interrogatories and requests were apparently filed with the court in the course of discovery, and the relevant excerpts from his deposition were appended to plaintiff's motion for summary judgment.[1] In reviewing the record, however, we find no indication that those answers to interrogatories and requests for admissions or the deposition were actually introduced in evidence at trial pursuant to Federal Rules of Civil Procedure 32, 33 and 36.

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[1] We do not consider whether plaintiff, having offered excerpts from the defendant's deposition, is now estopped to complain of their use by the district court.

Plaintiff argues that the court committed reversible error in relying on evidence which was not introduced at trial. The district court explained its use of the materials as follows:

> [W]hen a reason is supplied by an answer to an interrogatory or in a deposition not strictly "introduced," this deficiency may be cured by considering witness testimony and reasonable inferences therefrom. See Banerjee v. Board of Trustees of Smith College, 648 F.2d 61, 63 n.4 (1st Cir.), cert. denied, 454 U.S. 1098 (1981); cf. Burdine, supra at 255-56 (requiring employer to articulate reason serves in part the purpose of "fram[ing] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext").

In Banerjee, the defendant's articulated reason "was supplied by an answer to an interrogatory which the record shows was accepted by plaintiff. If, strictly, it was not 'introduced,' any deficiency was repaired by Smith's subsequent testimony in connection with plaintiff's response." 648 F.2d at 63 n.4. We found

that even "if [the defendant's] answer to the interrogatory was inadequate," id. at 64, the evidence introduced at trial, including the minutes of twelve committee meetings together with the testimony of the committee chairman and most of its members, id. at 64 n.5, "more than met the requirements" under Burdine, id. at 64. The evidence introduced at trial in the present case was less comprehensive than in Banerjee; here, the decision maker was an individual rather than a committee, and his deliberations were apparently not recorded in detail. Nevertheless, as in Banerjee, we look to the evidence actually introduced at trial to determine whether the district court's finding is adequately supported.

Defendant Vathally testified on direct examination that he "relied heavily on [Dr. Gillo's] opinion because it had to do with the department . . .

that deals with health and welfare of the citizens. And it was through his opinion that I based my final decision." Dr. Grillo, in turn, testified that

> [Vathally] asked me in my opinion who I thought was the better qualified, looking at the resumes. And I did, and I told him at the time I thought Mr. Bad[o]lato was. And my reasons for saying so were that he had a [b]achelor's degree and some postgraduate credits in the sciences which are applicable to Health Department duties.

Our review does not extend to the quality of business judgment reflected in this testimony, Loeb, 600 F.2d at 1012 n.6, but only to the question whether the testimony suffices to raise a genuine issue of fact as to defendants' intent, or, otherwise stated, whether it suffices to support a finding of no discriminatory intent. See Burdine, 450 U.S. at 254-55. The purpose of requiring a defendant to articulate a legitimate, nondiscriminatory reason in this context

is "to meet the plaintiff's prima facie case" and also "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." Id. at 255-56. In our view, the trial testimony by itself was adequate to support a finding that defendants lacked discriminatory intent. Furthermore, there can be no question that plaintiff was fully aware of defendants' explanation and had ample opportunity to attempt to demonstrate pretext. The testimony here was neither a merely passing reference nor a vague averment of good faith, cf. Loeb, 600 F.2d at 1012 n.5 (insufficient articulation), but rather a clear and reasonably specific explanation, see Burdine, 450 U.S. at 258. Vathally's unintroduced deposition, and his answers to interrogatories and requests for admissions, were entirely

cumulative. They merely restated the explanation elicited at trial, namely, that defendants' hiring decision was based on Badolato's superior educational qualifications. Although it would have been improper for the district court to rely on those extra-evidentiary documents in weighing the merits of the case, we assume that the court mentioned them only to corroborate its finding that plaintiff had fair notice of defendants' position. Because the trial testimony alone was sufficient in this respect, we find no reversible error.

Having found that the defendants met their burden of articulating a legitimate, nondiscriminatory reason, the district court proceeded to consider whether plaintiff showed by a preponderance of the evidence that defendants' articulated reason was a pretext for discrimination. The court

found that educational qualifications were "not so weakly correlated with job performance as to support an inference of pretext for discrimination," and that the evidence with respect to other criteria, viz. continuity and references, was "insufficient to support an inference of pretext based on the relative qualifications of plaintiff and Badolato." It also noted that the evidence did "support a finding that Badolato's educational qualifications were not the sole reason Vathally chose him over plaintiff." The court nevertheless concluded that it could not find from a preponderance of the evidence that Vathally was "motivated by a discriminatory animus" or that "plaintiff would have been appointed but for her sex."

Plaintiff contends that in order to prevail she needed only to show that

defendants' proffered reason was not the true or entire explanation for the decision. She argues, in effect, that the burden of proving "pretext" may be met simply by refuting defendants' articulated reason. We do not agree. From McDonnell Douglas to Burdine, the Supreme Court has consistently held that the required showing of pretext consists of proof "by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Burdine, 450 U.S. at 253 (emphasis added); cf. McDonnell Douglas, 411 U.S. at 805 (proof "that the presumptively valid reasons for [rejection] were in fact a coverup for a . . . discriminatory decision"). The plaintiff's burden of showing "that the proffered reason was not the true reason for the employment decision . . . merges

with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." Burdine, 450 U.S at 256. Thus, although the plaintiff may show pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence," id., such a showing does not relieve the plaintiff of the burden of persuasion on the ultimate issue of discriminatory intent. Id. Merely casting doubt on the employer's articulated reasons does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent, for "[t]he defendant need not persuade the court that it was actually motivated by the proffered rasons" in the first place. Id. at 254. To hold otherwise would impose on the defendant an almost

impossible burden of proving "absence of discriminatory motive," Board of Trustees of Keene State College v. Sweeney, 439 U.S 24, 25 (1978) (per curiam); id. at 29 (Stevens, J., dissenting), and would improperly revive the presumption in plaintiff's favor which was raised by the prima facie showing but "dispel[led]" by the defendant's articulation of reasons, Furnco, 438 U.S at 578. Moreover, any requirement that a defendant prove by a preponderance of the evidence that it in fact relied on its proffered reasons would vitiate the function of the pretext showing in the McDonnell Douglas analytical scheme. Sweeney, 439 U.S at 24-25 n.1.

In discriminatory treatment cases like the present one, the plaintiff always has the burden of persuading the fact finder by a preponderance of the

evidence that intentional discrimination has taken place, whether or not the presumption of discrimination arising from a prima facie case applies. Of course, when direct evidence is lacking, this burden may be met by an adequate showing of circumstantial evidence from which inferences concerning intent may properly be drawn. See Burdine, 450 U.S at 252-56. The district court's finding in this case that plaintiff failed to prove intentional discrimination is amply supported by the evidence. Defendants' proffered explanation was not clearly "unworthy of credence," id. at 256; and, even if other undisclosed motives entered into the decision, we think that the district court was correct in concluding that the evidence as a whole did not support an inference of unlawful sex discrimination.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 83-1767

SHARON WHITE,
Plaintiff-Appellant,

v.

THOMAS VATHALLY
and
CITY OF HAVERHILL,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MASSACHUSETTTS

Opinion
September 19, 1983

Keeton, District Judge:

This is an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., and under the Civil Rights Act of 1871, 42 U.S.C. §1983. Defendants, City of Haverhill and its then-mayor Thomas Vathally ("employer"), allegedly discriminated

against plaintiff on account of her sex in failing to hire her as a Health Department Code Enforcement Inspector ("inspector"). Plaintiff seeks back pay and damages. Plaintiff does not seek reinstatement because after the commencement of this suit she was hired as an inspector at the salary she would have received had the alleged discrimination never occurred. This court has jurisdiction under 28 U.S.C. §1343.

I. Applicable Law

The issue in this case is whether plaintiff would have been hired as an inspector but for her sex. Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979). "The central focus of the inquiry in a [Title VII disparate treatment] case such as this is always whether the employer is treating 'some people less favorably than

others because of their race, color, religion, sex, or national origin.'" Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), quoting Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

A §1983 equal protection claim arising from alleged employment discrimination involves the same elements as a Title VII disparate treatment claim. See T & S Service Associates, Inc. v. Crenson, 666 F.2d 722, 724 n.2 (1st Cir. 1981). A plaintiff alleging an equal protection violation must prove intentional discrimination. Washington v. Davis, 426 U.S. 229 (1976). Both of plaintiff's claims will be discussed under Title VII rubric.

Under the analytic framework set forth in McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973), a Title VII plaintiff initially must establish a

prima facie case of disparate treatment by proving that she applied for an available position for which she was qualified, but was rejected. If the plaintiff successfully establishes her prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment action at issue. If the employer carries this burden, the plaintiff must show either that a discriminatory reason more likely motivated the employer, or that the employer's proffered explanation is unbelievable.

To meet its burden of production, the employer must articulate its reasons for plaintiff's rejection through "the introduction of admissible evidence...legally sufficient to justify a judgment for the defendant." Texas

Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981). The employer cannot rebut a prima facie case merely through an answer to the complaint or by argument of counsel. Id. at 255 n.9. Moreover, the employer's explanation of legitimate reasons must be clear and reasonably specific. Id. at 258. A "passing reference by just one of many witnesses to some deficiency" in the plaintiff's qualifications or a vague averment of good faith is insufficient to rebut the inference of discrimination. Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.5 (1st Cir. 1979). However, when a reason is supplied by an answer to an interrogatory or in a deposition not strictly "introduced," this deficiency may be cured by considering witness testimony and reasonable inferences therefrom. See Banerjee v. Board of Trustees of Smith College, 648 F.2d 61,

63 n.4 (1st Cir.), cert. denied, 454 U.S. 1098 (1981); cf. Burdine, supra at 255-56 (requiring employer to articulate reason serves in part the purpose of "fram[ing] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext").

The Supreme Court clarified the nature of the employer's burden in Burdine, supra. The Court held that the employer only need raise a genuine issue of fact as to whether it discriminated against the plaintiff by introducing evidence setting forth the reason for the plaintiff's rejection. Thus, the burden of production shifts to he employer once the plaintiff has established a prima facie case, but "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all

times with the plaintiff." Id. at 253.

Plaintiff correctly asserts that in order to meet his burden of production, the employer must articulate legitimate, nondiscriminatory reasons for the employment decision. Burdine, supra. Plaintiff argues also that a reason is "legitimate" only if it is shown to be reasonably related to job performance. This argument has more debatable nuances.

Where an employer institutes employment tests and qualifications that have a disparate impact on a Title VII protected class, such requirements must be "shown to bear a demonstrable relationship to successful performance of the jobs" for which they are used. McDonnell Douglas, supra at 802 n.14, quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). However, an employer may rebut a prima facie case of disparate treatment by simply explaining

what it has done. Board of Trustees v. Sweeney, 439 U.S. 24, 25 n.2 (1978). The employer does not have the "burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff." Burdine, supra at 257. The employer need only produce evidence sufficient to allow the factfinder reasonably to conclude that the employment decision was not motivated by discriminatory animus. Id. A weak correlation between the articulated criteria and job performance may support an inference that the employer's proffered explanation was a pretext for illegal discrimination, but it does not compel such an inference.

Plaintiff correclty contends that a showing that the employer's proffered reasons are a "pretext" for sex discrimination compels a judgment in her

favor. Plaintiff also argues that a mere showing of pretext, as distinguished from pretext for sex discrimination, is sufficient to meet her burden. That is, she contends that her burden of proof may be met by showing merely that theemployer's explanation is not the true reason for the employment decision. She reasons that if the employer's explanation is unworthy of credence, the presumption of illegal discrimination originally arising from her prima facie case has not been rebutted.

Plaintiff's argument misreads the underlying purpose and operation of the McDonnell Douglas framework for analysis. The dispositive question in a disparate treatment case is whether the employer's action was based on Title VII prohibited criteria. the McDonnell Douglas approach is intended to "sharpen the inquiry into the elusive factual

question of intentional discrimination." Burdine, supra at 255 n.8.

In the Title VII contexzt, "prima facie case" denotes the establishment of a legally mandatory, rebuttable presumption of discrimination rather than the production of enough evidence to permit the factfinder to infer discrimianton. Id. at 254 n.7. That mandatory, rebuttable presumption arises only when plaintiff's evidence is such that record then stands, there is a preponderance of evidence supporting a finding of discrimination. Id. at 253-54. Establishment of a "prima facie case" mandates a finding of intentional discrimination in the absence of any explanation by the employer. Id. at 254. However, "the presumption drops from the case" once the employer articulates a nondiscriminatory reason for the employment decision. Id. at 255 n.10.

Contrary to plaintiff's contentions, threfore, the legally mandatory inference of discrimination that arises from plaintiff's initial evidence is dispelled once the employer meets its burden of production. At that point, plaintiff's burden of showing that the proffered reasons are pretextual "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." Id. at 256. The prima facie showing and inferences properly drawn from it continue to be relevant to the plaintiff's Title VII claim, but other evidence bearing on the employer's motive must also be considered. Loeb, supra at 1015 n.14; Burdine, supra at 255, n.10.

Therefore, a showing that the proffered reason is not the true or entire explanation for an employment decision does not satisfy the plaintiff's

burden of persuasion unless the fact finder is persuaded, by a preponderance of the evidence, that the employer discriminated against plaintiff on account of her sex. Merely showing that he articulated reasons does not fully explain the employer's actions does not, by itself, compel the conclusion that it was a pretext for illegal discrimination. Rather, it is circumstantial evidence to be weighed along with other evidence presented.

An employer has discretion to choose among qualified job applicants if this decision is not based on discriminatory criteria. The fact that a court believes an employer misjudged the qualifications of candidates does not establish a Title VII violation, although this may bear on whether the articulated reasons are pretexts for discrimination. Id. at 259.

A Title VII plaintiff can prove

pretext by circumstantial evidence. See, e.g., McDonnell Douglas, supra at 804-805. Evidence that an employer acted contrary to its customary policy in making an employment decision may support an inference of discrimination, Lindsey v. Angelica Corp., 508 F.Supp. 363, 366 (E.D. Mo. 1981), at least in the absence of evidence that the employer often did not follow its own stated policy. Title VII does not require an employer to implement or comply with any affirmative action policy. 42 U.S.C. §2000e-2(j); Burdine, supra at 259. An employer who violates its affirmative action policy is not per se liable for a Title VII violation. Cavallari v. Stetson, 555 F.Supp. 561, 565 (D. Mass. 1982).

Statistics establishing a pattern or practice of disparate treatment are probative but not conclusive in an individual disparate treatment case.

McDonnell Douglas, supra at 805 n.19. however, statistical evidence drawn from an extremely small universe has little probative value. Harper v. Trans World Airlines, Inc., 525 F.2d 409, 412 (8th Cir. 1975). Similarly, evidence of an unbalanced workforce is accorded little weight absent accompanying statistics showing the composition of the job applicant pool. Blizard v. Frechette, 601 F.2d 1217, 1224 (1st Cor. 1979).

II. Findings of Fact and Conclusions of Law

The parties have stipulated to certain facts. Plaintiff, a woman, was a C.E.T.A. employee working as Health Department Code Enforcement Inspector for the City of Haverhill from March 26, 1979 through september 19, 1980 when her 18-month C.E.T.A. appointment terminated. The duties of an inspector

include checking buildings for health code violations and testing the lead content of paint. On August 31, 1980, Vincent Belfiore retired from his job as an inspector, thus creating a vacancy in the Health Department. From October 2 through October 5, 1980, defendants advertised the availability of this position. The advertisements did not mention any need or preference for a college degree.

Plaintiff applied for the job of inspector by submitting an application, resume, cover letter, and letters of recommendation to defendant Vathally. Plaintiff was qualified to perform the duties of an inspector. On or about October 13, 1980, Vathally, the city's sole appointing authority, hired Domenic Badolato, a white male applicant, for the position of inspector.

Under the evidence adduced, I find the following additional facts. Plaintiff held an associate's degree from Northern Essex Community College with a major in psychology. She also completed 77 credits at the University of Massachusetts, majoring in psychology but did not have a bachelor's degree. Domenic Badolato held a bachelor's degree from Merrimack College with a major in biological science. He also completed 16 post-graduate credits at Merrimack, including courses in microbiology and biochemistry. Until Badolato's appointment, no inspector employed on a permanent basis held a college degree. Badolato was employed as an inspector under the C.E.T.A. program from mid-June of 1978 through mid-December of 1979.

Vathally met with plaintiff at her request on September 2, 1980. He informed her that there were no positions

available at that time. Vathally arranged a meeting with Badolato to discuss his job application. Vathally spent more time talking with Badolato than he did with plaintiff.

Vathally asked Dr. Grillo, the city's environmental consultant, to review the applications of plaintiff and Badolato, the two finalists for the job. Grillo recommended Badolato for the job because of Badolato's superior educational background. Grillo had recommended Badolato for a previous job with the city, and Badolato had given Grillo's name to Vathally as a reference. Vathally did not consult with anyone else before hiring Badolato. Neither Vathally nor Grillo was as familiar with the duties of an inspector as were those persons who recommended plaintiff for the position.

In appointing Badolato, Vathally did not follow the recommended procedures set forth in the city's Equal Employment Opportunity ("E.E.O.") statement of policy. That policy provides that the E.E.O. Officer review the list of applicants for employment and advise the Mayor before a final selection is made. Vathally apoointed Badolato before the E.E.O. Officer had an opportunity to review the entire list of applicants. Vathally also did not follow the recommended E.E.O. procedures for the two other appointments he made in October of 1980.

The evidence is incomplete concerning Vathally's record for hiring women for full-time non-clerical positions. The E.E.O. Officer testified that Vathally had nver appointed a woman to a full-time non-traditional job. However, no statistics were offered to show the

composition by sex of the job applicant pool for each available position or the exact number of full-time jobs that were filled during Vathally's tenure.

The parties do not dispute that plaintiff has established a prima facie case of discriminatory treatment. She is a member of Title VII protected class. She applied for the job of inspector, for which she was qualified, but was rejected.

I conclude that defendants have sufficiently articulated their reason for rejecting plaintiff in favor of Badolato. In his answers to interrogatories and requests for admissions, and in his deposition, Vathally repeatedly stated that the decision to hire Badolato was based on Badolato's superior qualifications for the job--specifically, his educational background. Vathally testified at trial that he based his decision on Grillo's

recommendation. Grillo in turn testified that he believed Badolato's bachelor's degree and extensive training in the sciences made him better qualified for the job.

Moreover, I find that educational background is a legitimate criterion on which to base employment decisions for the position at issue here. An employer reasonably could conclude that possession of a college degree with an emphasis in the sciences indicates self-discipline and an ability to complete tasks and follow instructions. Similarly, knowledge of the sciences reasonably could be viewed as potentially helpful to understanding, interpreting, and disseminating information concenring the environmental sanitation and building construction standards applicable in the work of a Health Department inspector. Moreover, plaintiff, by including her educationaly background in her resume, impliedly

acknowledged the potential relevance of education to the employment decision.

I find that plaintiff has not shown by a preponderance of the evidence that defendants articulated reason for its decision not to hire her was merely a pretext for illegal discrimination. Educational background is not so weakly correlated with job performance as to support an inference of pretext for discrimination. Vathally's unfamiliarity with details of the duties and responsibilities of an inspector make it more likely that he would rely on an objective, easily ascertainable criterion such as educational level achieved.

The evidence before me is insufficient to support an inference of pretext based on the relative qualifications of plaintiff and Badalato. On the objective criterion articulated by defendants--level of educational achievement-- Badalato's qualifications were superior. The

arguments advanced for regarding plaintiff as the wiser choice were: (1) to serve the interests of continuity in the job; and (2) to appoint the candidate most highly recommended for the job.

The difference between the two finalists in the former respect was preceptible but not substantial since Badalato's 18-month term as inspector had ended only months before that of plaintiff. Plaintiff submitted seven letters in support of her application. Four letters did not specifically recommend plaintiff for the position here at issue. Papachriston's letter recommended plaintiff "[i]n order to maintain continuity in the department." As noted before, appointment of either of the two finalists would serve this end. The two remaining letters supported plaintiff's appointment as inspector.

Although this is relevant to circumstantial evidence, neither separately nor together do these facts show that the qualifications of the two finalists were so disparate as to support an inference that discriminatory animus affected the appointing official's decision.

The evidence does support a finding that Badalato's educational qualifications were not the sole reason Vathally chose him over plaintiff. However, it does not follow--and I cannot find from a preponderance of the evidence-- that Vathally was motivated by a discriminatory animus. The evidence concerning Vathally's record of appointing women to permanent, full-time positions is inconclusive. No evidence was introduced regarding the

composition of the applicant pool for each available job. Any inference of disparate treatment of plaintiff arising from Vathally's failure to follow E.E.O. recommended procedures is undercut by the fact that Vathally did not follow these procedures in any of his October, 1980 appointments.

It is clear from the evidence that both plaintiff and her final competitor for the position were well qualified applicants. Even though other considerations beyond those articulated in evidence may have been factors in the decision, I cannot find on the evidence before me that plaintiff would have been appointed but for her sex.

For the foregoing reasons, judgment will be entered for defendants.

/s/
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SHARON WHITE, Plaintiff v. THOMAS VATHALLY and CITY OF HAVERHILL, Defendants	)	CIVIL ACTION NO. 81-2022-K

JUDGMENT

September 19, 1983

KEETON, D.J.

In accoreance with the Opinion of the Court issued this day, it is ORDERED:

Judgment is hereby entered for the Defendants.

By the Court:
GEORGE F. McGRATH, CLERK

/s/
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1767.

SHARON WHITE,
Plaintiff, appellant,

v.

THOMAS VATHALLY and CITY OF HAVERHILL,
Defendants, appellees.

BEFORE

CAMPBELL, Chief Judge,
COFFIN, BOWNES AND BREYER, Circuit Judges,

ORDER OF COURT

Entered: June 8, 1984

The judges of the Court who are in regular active servcie having voted agianst rehearing en banc,

It is ordered that said application for hearing en banc is hereby denied.

By the Court,

/s/
Clerk.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1767.

SHARON WHITE,
Plaintiff, appellant,

v.

THOMAS VATHALLY and CITY OF HAVERHILL,
Defendants, appellees

CAMPBELL, Chief Justice,
BOWNES, Circuit Judge,
and GIERBOLINI,* District Judge.

ORDER OF COURT

Entered: June 8, 1984

Insofar as appellant seeks a rehearing by the panel, the petition is denied. Appellant raises precisely the same arguments that this court rejected in its opinion of May 1, 1984, Appellant contends that she carried her bruden under Burdine of proving that

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* Of the District of Puerto Rico, sitting by designation.

appellees' proffered explanation for their employment decision was "unworthy of credence." Texas Department of Community Affairs V. Burdine, 450 U.S. 248, 256 (1981). Although the district court found that the proffered explanation, viz. educational qualifications, was not the sole reason for appellees' employment decision, it found the correlation between educational qualifications and job preference sufficiently strong to withstand appellant's allegations of pretext, and concluded that appellant failed to prove intentional discrimination by a preponderance of the evidence. The district court did not find that appellees' proffered explanation was unworthy of credence; nor will this court, having already

reviewed the district court's findings and determined them not to be clearly erroneous, reconsider questions of fact. As to the applicable legal standard, it is unnecessary to reiterate the analysis of Burdine set forth in our opinion on pages 10-12. In response to appellant's mistaken contention that our decision would require a plaintiff "to not only prove that a defendant's articulated reasons were a pretext but also prove discrimination by affirmance evidence," it should be noted that, once legitimate reasons are articulated, a plaintiff's burden of proving intentional discrimination merges with that of showing that the defendant's articulated reasons

were a pretext for discrimination. it is not enough merely to cast doubt on the defendant's proffered reasons; they must be shown to be unworthy of credence. Appellant failed to carry her burden, and her petition is denied.

By the Court,

/s/

Clerk.